

CLYDE&CO

# Due Diligence & Leadership for Council Officers

Alena Titterton, Partner – Clyde & Co

11 October 2023



Transport  
for NSW

# Agenda

1

## Leadership in Focus

- Characteristics of Great Safety Leaders

2

## Architecture of the WHS Act

- Duty Holders (PCBUs, Officers, Workers, Others) and Penalties
- Primary Duty (s 19)
- Reasonable Practicability

3

## Officer Due Diligence in Focus

- Officers' Duties: Elements of Due Diligence (s 27)
- Case Studies

4

## Final Observations

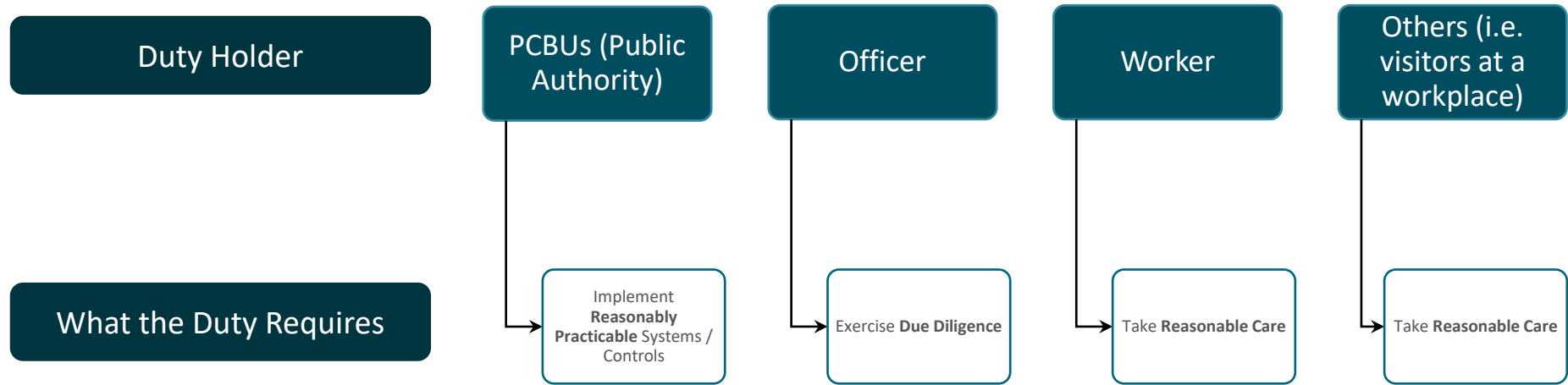
- DDI-S
- Questions

# Leadership in Focus

Characteristics  
Of Great Health and  
Safety Leaders



# Architecture of the WHS Act: Duties at a Glance

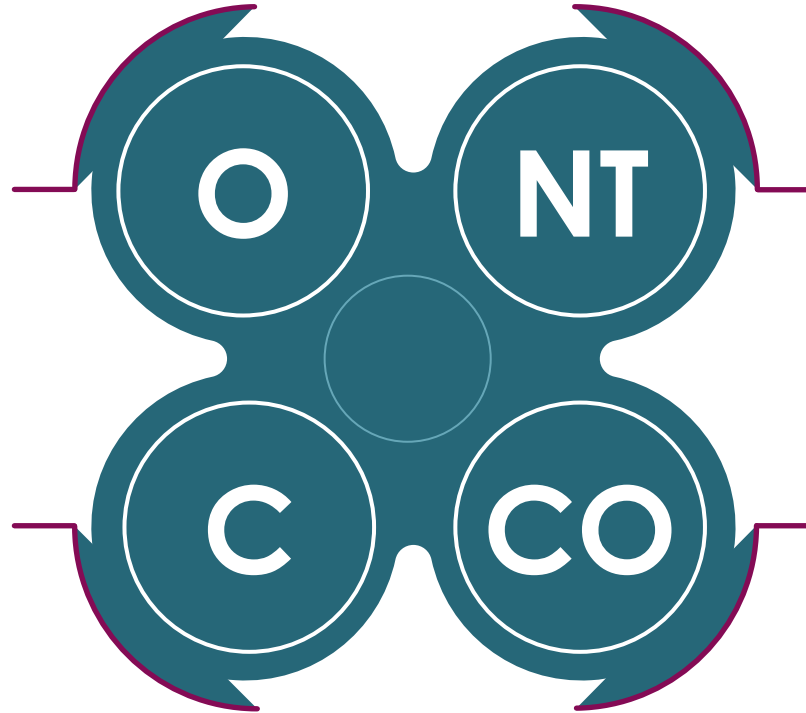


Breach	Public Authority	Officer	Worker
A person has a duty and without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or serious illness and the duty holder engages in the conduct with gross negligence or was reckless as to the risk to an individual of death or serious injury or serious illness.	AUD \$3,992,492	AUD \$798,383 and/or 5 years imprisonment	AUD \$399,479 and/or 5 years imprisonment
A person has a duty and fails to comply with that duty and that failure exposes any individual to a risk of death or serious injury or serious illness.	AUD \$1,996,246	AUD \$399,479	AUD \$199,451
A person has a duty and fails to comply with that duty.	AUD \$665,223	AUD \$133,159	AUD \$66,291

# Key Concepts Informing WHS Act Duties

## Overlapping Duties

Each duty holder must comply with their required duty to the standard even if another person has the same duty



## Concurrent Duties

More than one person can have a duty

## Not Transferrable

Duties are not transferrable

## No Contracting Out

Duty holders cannot contract out of their WHS Duty

# Section 19 – Primary Duty of Care

PCBUs must ensure, so far as is reasonably practicable:

The health and safety of:

- a) workers engaged, or caused to be engaged by the person; and
- b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking



The health and safety of:

- other persons is not put at risk from work carried out as part of the conduct of the business or undertaking



The provision and maintenance of:

- a work environment without: risks to health and safety;
- safe plant and structures; and
- safe systems of work

The safe use, handling, and storage of plant, structures and substances.

The provision of:

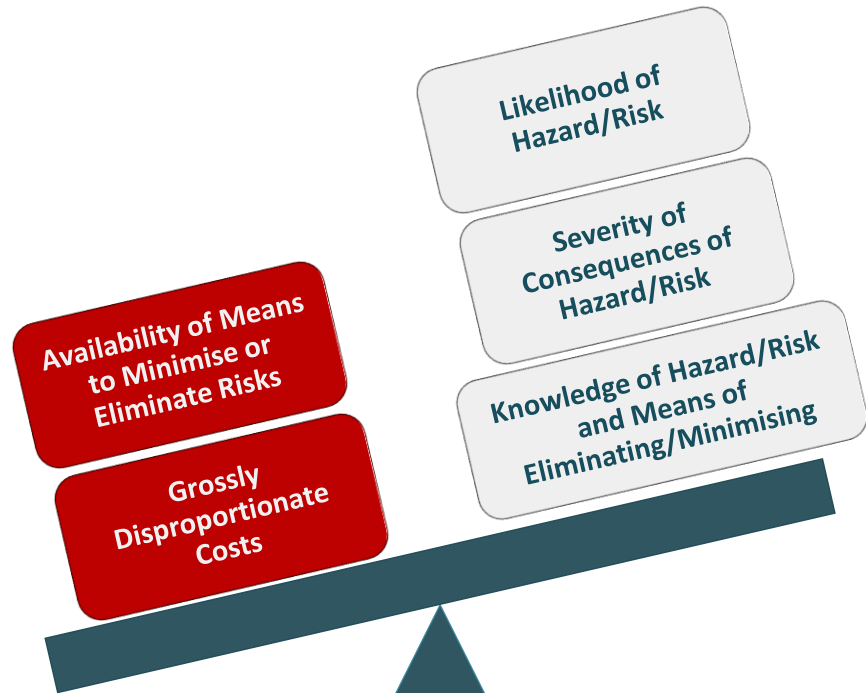
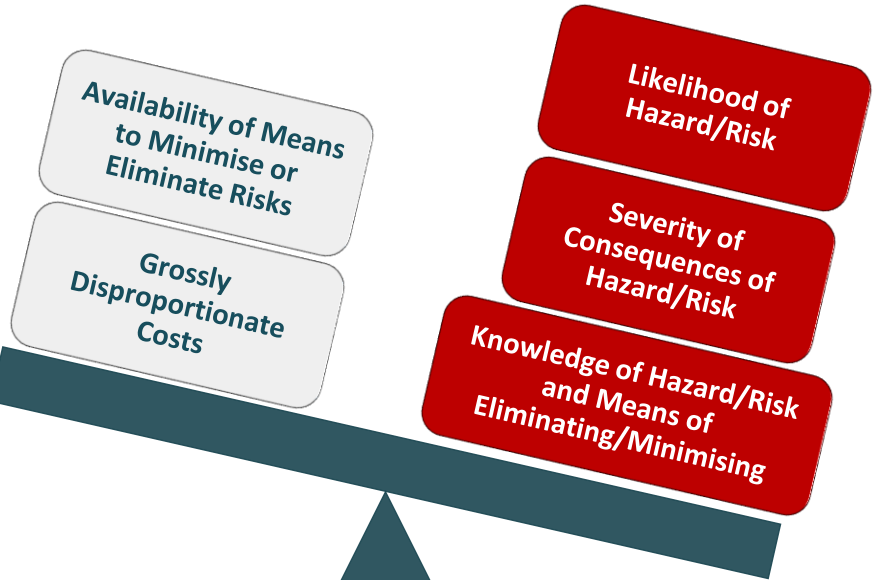
- adequate facilities for worker welfare; and
- information, training, instruction and/or supervision that is necessary to protect all persons from risks to health and safety

The monitoring of the health of workers and conditions at the workplace

# What is Reasonable Practicability?

Reasonably Practicable

Not Reasonably Practicable



Elimination/Minimisation

Hazard/Risk

Elimination/Minimisation

Hazard/Risk

# The Six Elements of Due Diligence:



01.

## Know

Acquire and keep up to date knowledge of work health and safety matters



02.

## Understand

Understand the nature of the operations of the Public Authority and generally the hazards and risks associated with those operations



03.

## Resource

Ensure the Public Authority has appropriate resources and processes in place to eliminate or minimise risks to health and safety



04.

## Monitor

Consider information regarding incidents, hazards and risks and respond in a timely way to that information



05.

## Comply

Ensure the Public Authority has processes in place to comply with all WHS duties and obligations under legislation



06.

## Verify

Personally and proactively verify the provision and use of the resources and processes outlined in steps 3-5

## Who is an Officer?

- Elected members of councils are exempt from the definition of officers
- A person who **makes, or participates in making, decisions** that affect **the whole, or a substantial part**, of the business or undertaking of a public authority is taken to be an officer of the public authority for the purposes of this Act
- General Managers and those reporting directly to the General Manager will generally be considered officers

Section 252 of the *Work Health and Safety Act*



Do you understand what the due diligence obligation under the WHS Act requires officers to do?

# Element 2: Case Study



**UNDERSTAND THE NATURE OF THE OPERATIONS OF THE UNDERTAKING AND GENERALLY THE HAZARDS AND RISKS ASSOCIATED WITH THOSE OPERATIONS**

The Court found that Camden Council had disregarded the known dangers arising from the use of Men's Shed Volunteers.

Consider and clearly identify risks associated with volunteers.



## *SafeWork NSW v Camden Council* [2021] NSWDC 709



Category 2 offence  
*Work Health and Safety Act*  
2011 (NSW)



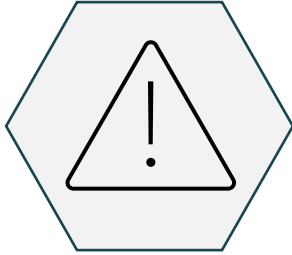
Pleaded guilty to breaching  
the primary duty of care



Convicted and fined \$1,000,000,  
reduced by 25% for an early guilty  
plea

How do you currently obtain an understanding of the critical health and safety risks in your Council's operations?

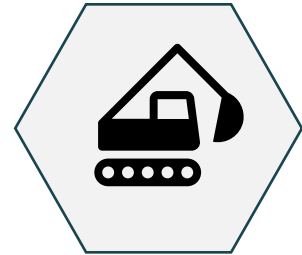
# Element 2: Local Government Critical Risks



Hazardous Substances



Psychosocial Hazards



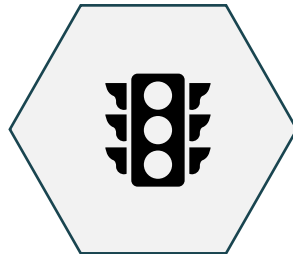
Mobile Plant



Working at Heights/Falling Objects



Electrical



Traffic Management



Volunteer Management



Contractor Management

# Element 3: Case Study



**ENSURE THE PUBLIC AUTHORITY HAS APPROPRIATE RESOURCES AND PROCESSES IN PLACE TO ELIMINATE OR MINIMISE RISKS TO HEALTH AND SAFETY**



The Court found that Walgett Shire Council failed to implement its workers-on-foot plan in a way that provided "real protection" to workers required to work on foot near mobile plant

## *SafeWork NSW v Walgett Shire Council* [2023] NSWDC 70



Category 3 offence  
*Work Health and Safety Act*  
2011 (NSW)



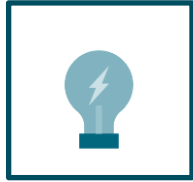
Pleaded guilty to breaching  
the primary duty of care



Convicted and fined \$55,000,  
reduced by 10% to \$50,000 for an  
early guilty plea

Do you currently include an analysis of health and safety impacts in your major strategic decision-making at the Council?

# Element 4: Case Study



**CONSIDERING INCIDENTS, HAZARDS  
AND RISKS & RESPONDING IN A  
TIMELY WAY TO THAT  
INFORMATION: MAKE SURE  
INFORMATION GETS TO THE RIGHT  
PEOPLE**

---

The Court found that Gannawarra Shire Council had considered section 38 of the OHS Act but determined the incident was not notified and did not notify WorkSafe.

***WorkSafe Victoria v Gannawarra Shire Council (Kerang Magistrates' Court, 7 April 2022)***



Section 38 offence  
*Occupational Health and Safety Act 2004 (Vic)*



Pleaded guilty



No conviction recorded, Council fined \$15,000 and ordered to pay costs of over \$4000

How are you currently reviewing health and safety performance across the operations of the Council?



# Element 5: Case Study



## ENSURE THAT THERE ARE PROCESSES IN PLACE FOR COMPLYING WITH WHS LEGAL COMPLIANCE OBLIGATIONS

---

An independent inquiry found the council instructed its workers to dig up, transport, and sift through soil it knew was contaminated with asbestos.



## *SafeWork NSW v Blue Mountains Council*



Breaches under 425(1), 429(2), 445(1) and 479(1) of the Work Health and Safety Regulation 2011 (NSW).



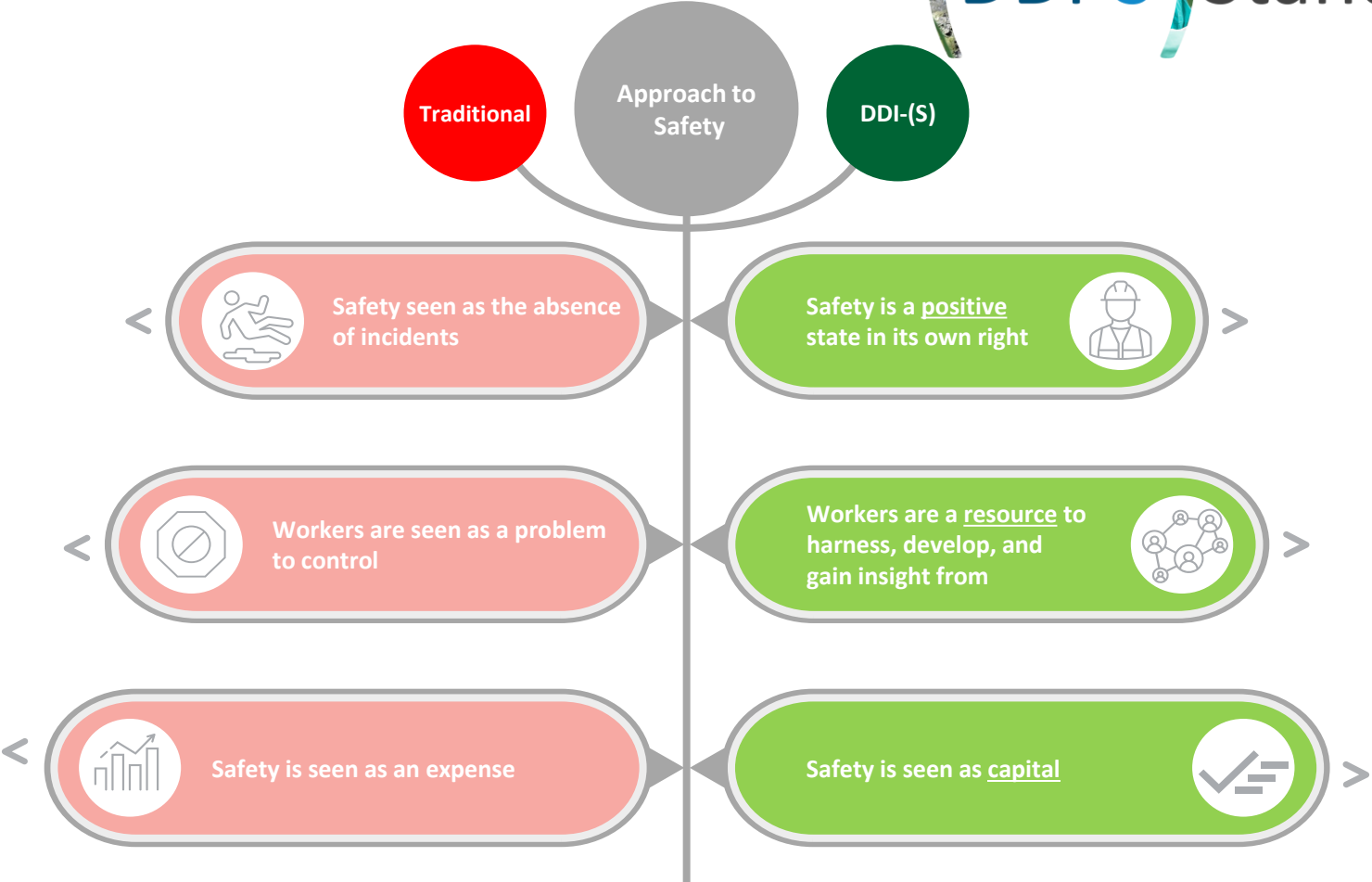
Entered into an Enforceable Undertaking



This undertaking has a total expenditure of \$513,880, involving a number of initiatives

How are you currently ensuring WHS legal compliance at the Council?

# Due Diligence Index (Safety)



What are you going to do differently in your personal approach to safety due diligence after this summit?

# CLYDE & CO

## Safe Work Australia Interpretive Guidelines and Fact Sheets:

- [Interpretive Guidelines – Model Work Health and Safety Act – The Health and Safety Duty of an Officer under Section 27](#)
- [Frequently Asked Questions – Officers](#)

Questions?  
Want to read more?

## Tooma's CCH Due Diligence Series:

- [Duty of Officers – 3<sup>rd</sup> Edition](#)
- [Incident Notification, Management & Investigation – 3<sup>rd</sup> Edition](#)
- [Horizontal and Vertical Consultation – 3<sup>rd</sup> Edition](#)
- [Worker Rights and Duties – 3<sup>rd</sup> Edition](#)
- [Dealing with Regulators – 3<sup>rd</sup> Edition](#)
- [Persons Conducting a Business or Undertaking – 3<sup>rd</sup> Edition](#)
  
- [Mental Health – 1<sup>st</sup> Edition](#)
- [Managing Contractors – 1<sup>st</sup> Edition](#)



Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.  
© Clyde & Co LLP 2022

Clyde & CoLLP

**Contact:**

**Alena Titterton**

**Partner | Clyde & Co**

**Direct Dial:** +61 2 9210 4577

**Mobile:** +61 439 077 702

**Email:** [alena.titterton@clydeco.com](mailto:alena.titterton@clydeco.com)



[@AlenaTitterton](https://twitter.com/AlenaTitterton)



[www.linkedin.com/in/alena-titterton-91888a56/](https://www.linkedin.com/in/alena-titterton-91888a56/)



[www.clydeco.com](http://www.clydeco.com)